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## Prisoners' Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation

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PRISONERS' RIGHTS AND THE CORRECTIONAL  
SCHEME: THE LEGAL CONTROVERSY AND  
PROBLEMS OF IMPLEMENTATION\*

I. AFTERNOON PANEL DISCUSSION

COMMENT: I am Cedrick Thompson from the Division of Corrections and Parole in New Jersey. I have a statement to make concerning the discussions of censorship with respect to inmate correspondence. In New Jersey, we have embarked on a program to virtually eliminate the censorship of mail. I speak with authority on this because I was involved in developing this program for state correctional institutions. What we are doing in New Jersey now is this: we are examining inmate correspondence for contraband material, but we are deviating from the previous method of censorship. As a matter of fact, we refrain from using the word "censorship" at all, but rather use the word "examination" of mail. We also permit inmates in the correctional institutions to send unexamined mail to certain persons in the state; for instance, the Director of the Division of Correction and Parole, Board of Managers, the public defender and, in some instances, their private lawyers.

We are moving toward a different system in New Jersey, taking into consideration the rights and privileges of our inmates. We also examine some of the problem areas in our institutions and develop standards in order to bring them up to those established by the American Corrections Association. It is this type of program which we are developing in New Jersey; a program which, perhaps, some of the other states are not yet enjoying.

QUESTION: Mr. Brierley, you gave us some of your comments concerning "jailhouse lawyers." Could you give us some examples, from your knowledge of prison conditions in Pennsylvania, of other problems arising within the prisons, specifically; censorship, relations between prisoners, and mass communications from the outside such as radio and television?

MR. BRIERLEY: Conditions here are very much the same as stated by our friend from New Jersey. We in the state correctional

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\* This Symposium is presented in two parts. The afternoon session is in the nature of a workshop. The panelists present their papers and then discuss the positions adopted among themselves and with the members of the *Law Review* and distinguished invited guests. During the evening session, which is open to the public, the panelists restate their basic positions and explore the various issues in a general manner. The more salient portions of both panel discussions are reproduced here.

institutions of Pennsylvania no longer have "censorship," but rather "examination" of mail. There is free correspondence — even unlimited correspondence today. The only time that a resident would be prevented from corresponding with someone would be upon a realistic complaint by the one with whom he corresponds. We found recently that some of our residents, in their attempts to communicate with people, have invaded the privacy of these people because they are corresponding with people who are completely unaware of the resident's motive and who have requested that mail not be forwarded to them.

Another area of censorship that we have eliminated is in the area of book and magazine subscriptions. Today, every magazine that is on sale at your local newsstand is acceptable at the institution. Books no longer need be ordered from the publisher, but may be directly ordered from any local book store.

Effective March 15th, 1971, which is very soon, residents of our institution have an increased commissary privilege wherein they can now order wrist watches, transistor radios and — if we can accommodate them — television sets for themselves.

We are undergoing another transition in our penal system that poses a problem for our administrators, which the employees and the security force especially, have been unable to cope with. I have been criticized — as a matter of fact, to the point where they pulled what is known as a "blue flu" epidemic on me not too long ago in retaliation — for turning the gates wide open and having people enter the institution.

We have initiated a prison publication referred to as "Vibrations." It is a complete departure from any other prison publication in that there is no recognition of the warden, the Commissioner or even the Governor; no name is mentioned, and the publication is free of censorship. It is our attempt to bring about a better understanding through a tri-community type of publication — some information from the administrators of our system, the community, and the residents. There is no censorship except what they themselves censor. We brought in people from the universities and members of the press, members of all the news media, who meet with our inmates almost daily in an attempt to help them publish a newspaper which would be acceptable and which would avoid having an anti-establishment overtone. The prisoners' feelings are that the public is now sick and tired of reading about anti-establishment gripes and the problems of other people. We are striving to direct the members of the editorial staff into channels of communication which would be acceptable to

the community. Believe me, it is as wide open as you would want any paper. We have set no censorship guidelines for the editors except those which they have established themselves.

MR. RABINOWITZ: I would like to ask a question. Does this publication circulate among the prisoners?

MR. BRIERLEY: About 2,000 of these leave the prison weekly.

MR. RABINOWITZ: What about the prisoners themselves, do they also read it?

MR. BRIERLEY: Yes.

MR. RABINOWITZ: Suppose that a copy of this publication were to urge the prisoners next week to skip their lunch meal because of a protest against the bad food that they're getting — a non-violent protest; or, to say that on January 14th there will be a minute of silent prayer before the evening meal because of the anniversary of the assassination of Malcolm X. Would the prison authorities do anything about that? What would their reaction be?

MR. BRIERLEY: I wouldn't do anything, personally. I can't, however, answer for the administrators of other prisons.

QUESTION: I would like to obtain a definition, if there is one any longer, with respect to punishment within the concept of correction, as this concept relates to prisoners' rights.

JUDGE SPAETH: I think one thing that should be kept in mind is that a person is not sent to prison *for* punishment; the fact that he is sent to prison *is* the punishment. I think we tend to view punishment as something to be imposed in addition to prison — that is not my concept and I don't really think that the concept of prison as a place for punishment is consistent with the philosophy underlying our penal laws. The phrase is used that "a man pays his price to society" when he has served his time. Well, it ought to be that way. If he is sent to prison for 3 to 10 years and serves it, then he has met the burden imposed upon him as punishment. I think prison is the place where the state has him, *per force*, and the state should undertake to do what it can so that when he has served his time, he leaves more able to lead a responsible life than when he came in.

MR. CRAWFORD: I think that you have to remember that there are times when there properly is punishment in prison too, but the punishment that is applied in prison is normally for a violation of rules while in prison. Having been "sentenced" to two years in the

army, I know that the deprivation of freedom itself can be a punishment, although I think you pay it for various things: being a citizen, or committing a crime, or something like that. Once you get into prison, you can also expect to be punished if you engage in further anti-social conduct; sometimes, if it is anti-social enough, by another prison sentence.

QUESTION: The panel has focused upon the basic phrase "Prisoners' Rights," and what comes to mind when I think of a right, is an activity which is brought within the protection of the laws. My question is, to anyone on the panel, what type of protection scheme or protection machinery might be utilized to protect any rights which would be created? Would perhaps the traditional writ processes work, or would an administrative board of some sort have to be established to screen out cases on an ad hoc basis and then refer them to the courts?

JUDGE SPAETH: You have to define the rights you are talking about. As some of us mentioned, for example, one has a right not to be treated negligently. One has the right to bring a tort claim. You have a right not to be deprived of your civil rights under the Federal Civil Rights Law. You have a right not to be deprived of your constitutional rights which you may assert under Writ of Habeas Corpus, for example. There are all of those established procedures. Generally, they come up either under Federal Civil Rights or on Writ of Habeas Corpus, but sometimes, as in the cases I refer to, it may arise in a very old-fashioned venerable role of a petition to show cause why something should not be or should be done. I don't think there is really much problem in defining the rights because the whole concept of rights gets very tricky. I would, for example, suggest that Jim Crawford drew a false analogy when he said that a prisoner has a right to rehabilitation. In fact, there is a decision by Justice Marshall in *Powell v. Texas*<sup>1</sup> where he specifically observed that the Constitution does not provide a constitutional right to rehabilitation. You get all tangled up in this problem of rights and privileges and remedies. What I would suggest, is that you should all keep your eye on the very pragmatic question, "Is the prison system working?" Now we know very well it isn't working. Therefore, how do you make it work. Well, I think the way you make it work is to make it possible for deficiencies to be brought into a forum where they may be corrected. To some extent, that may be within the courts' authority; to some extent, it may be within the legislature's authority. In general, it will be up to the judicial authorities, the courts. My difficulty with

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1. 392 U.S. 514 (1968).

the cases has been that too often the courts draw back and decline to intervene, and use all sorts of verbiage to cloak their declination.

MR. CRAWFORD: That seems to me to be one of the most appalling thoughts I have ever heard, Judge Spaeth, that a judge would say that a court should raise as the question to consider whether a prison is working. That is probably the greatest mandate to do good ever handed over to anybody that I have ever heard, and it is handed over to an official who is probably the most remote from the popular electoral process — although judges in Pennsylvania are elected. Isn't "*Are the prisons working?*" the question the governor probably should ask? Isn't he the one who should do something about it?

JUDGE SPAETH: I'm glad I shocked you.

MR. CRAWFORD: I enjoyed it.

JUDGE SPAETH: I would only point out that your reliance on the legislature has brought very little fruit since those laws of 1835.

MR. CRAWFORD: Those you could have enforced in the court — no question. Those are specific legislative mandates enforceable in the courts, a general commission to do good. That is what I suggest the courts look for.

JUDGE SPAETH: Well, we'll talk about that this evening. I think we ought to hear questions from the audience.

QUESTION: Mr. Taylor, do the inmates feel that the parole system is an effective system as it is presently set up?

MR. TAYLOR: The parole system may be effective as far as parole officials are concerned. Prisoners, however, generally see the parole system as very oppressive. They see the parole system as one in which you have to surrender your manhood as the number one condition to getting out. They see the parole system as one in which you have to tell all sorts of fantastic lies in order to get paroled.

QUESTION: Would you be more specific?

MR. TAYLOR: Yes. You have to go into a little room with members of the Parole Board, and you have to tell them that you have been rehabilitated, when in fact there is nothing in the prison to accomplish that end. There are no facilities there for rehabilitation. You have to tell them that you have learned all kinds of lessons in only two years — lessons that could possibly take a lifetime to learn. You are lying and they know you are lying. That's the only way you

can get out. One has to "plead guilty" to the Parole Board for the crime for which he is currently being sentenced, regardless of his plea at trial. Failure to follow this procedure is "indicia" to the Board that you are not yet rehabilitated and thus, not ready for parole. It is horrible.

QUESTION: How do you feel about an answer like that, Judge Spaeth?

JUDGE SPAETH: It doesn't surprise me. I just this week got a letter from a prisoner I sentenced to a one to eight year sentence about a year ago. At the end of his year he was eligible for parole. He therefore applied for parole, it was refused, and he wrote and complained to me. He wanted me to commute his sentence, et cetera. He told me what the Parole Board had said. He had gone into this room, had his hearing, and, in due course, he had gotten this little slip of paper saying "Application for parole turned down considering all the circumstances of the case and for development of appropriate plans." He didn't know what that meant and I don't know what it meant. I think that it illustrates very well what Joe Brierley was talking about. I think that a great deal of pressure could be taken off the prisoners and off the prison administration, if the prisoners had available to them legal resources and legal standards that they do not now have. I think that when a prisoner applies for parole he is entitled to a great deal more information than he gets now. Just as Mr. Brierley points out, it has worked when legal advice is given the prisoners; they then have confidence. That removes a lot of the pressure and gives them assurance that they are within the law rather than outside it. I think that if you found that you had to have standards articulated, shortcomings in the prison system would in turn be articulated and would become visible rather than invisible and would thereby be able to be remedied. I think the reason a lot of things are not being remedied now is because they are not known. If they became visible and the shortcomings were remedied, then I think you would find real rehabilitation happening and you wouldn't find prisoners being forced to lie. If prisoners had real opportunities to learn a job, they could go to the Parole Board and say, "Yes, if you let me out I will be able to work as a sheet metal worker," instead of some "flim-flam" talk about "Oh, yes, I've learned my lesson and I'll be a good man."

QUESTION: I just wanted to ask the reaction of the panel to the proposed prospect of having somebody in the prison to whom the prisoners could go with specific grievances, who would investigate

them, would process and fight for them. How do you feel about that, Mr. Taylor? Do you think that would be effective?

MR. TAYLOR: Who would the person be?

RESPONSE: It would probably be an outside person. The plan that is now being submitted for funding in Philadelphia provides for an outside person. Probably a lawyer, although I am not sure that would be the best choice.

MR. TAYLOR: I think that would be very fine once that person demonstrated to the inmate population that he could be trusted.

QUESTION: What kind of problems could be referred to such a person?

MR. TAYLOR: Parole problems — number one. Secondly, the problem of the intra-institutional disciplinary hearings, wherein prisoners are arrested, tried and sentenced by institution officials without benefit of any due process of law.

QUESTION: I would like to address this question to Mr. Rabinowitz. Regarding the tearing down of all the institutions in the country: do you have any alternatives, in order to protect the rights of John Q. Public, for institutionalization of chronic offenders?

MR. RABINOWITZ: I wish I could speak literally when I refer to "tearing down prison walls." I guess I was speaking metaphorically. But I don't mean to minimize that. I can't suggest an easy alternative to prisons, given the society we live in. One of the problems is that, in a sense, we are starting to investigate the problem at the wrong end in terms of time. We may be treating, for example, a very violent prisoner who has committed many felonies, many crimes of violence. We are trying to do it when he gets to be 45 years old; trying to figure out what to do with him, when as a matter of fact, the problem originated perhaps 30 years ago. That was when we should have directed our attention to it. It is very difficult to solve this type of problem after a man has been convicted of many crimes and we know that he is probably never going to be able to live in a society safely again. I am inclined to think — and I say this with a lot of regret; I hope somebody here will challenge me — that some kind of detention facilities are going to be necessary for a limited number of people until we have grown a great deal wiser than we are now.

I do think, however, that it is a mistake to get the impression that all the people in our prisons now are that kind of dangerous



person, because very, very few of them are that kind of person. Mr. Crawford's speech here made me feel that prison is only the last resort, and just a handful of people get to that; the rest of them being handled by probation and pre-indictment probation and all the rest of that. Well, that is just not so. A very large proportion of the people who are arrested for crime go to jail; they spend time there either before or after conviction. Of those people, very few have to be quarantined as the only solution. I would like to "tear the prison walls down," but I can't, in a literal sense, think of a ready, easily-made substitute for them.

QUESTION: I would like to address my question to Mr. Crawford who said that the District Attorney's Office is for probation rather than imprisonment, except as a last resort. After the Holmesburg riot, it occurs to me that it is within the District Attorney's power to decide to drop charges when things like drugs are found in prison and how they got there is not clear. No guards were charged. Some men could serve their whole lives in prison because of the Holmesburg riot. The fault does not lie with those men alone. May I have your comments?

MR. CRAWFORD: I don't know a more constructive way to deal with people who try to take peoples' arms off with cleavers or to cut their guts out with kitchen knives. I tend to think those cases belong in prison indefinitely. I don't want to ride the subway with those people and I don't want to walk the streets with them. That is why I still believe in a quarantine type prison. I also believe in a punishment type prison, and I think that those of us who haven't hit people, haven't stabbed people and have used our self-restraint probably feel better because we realize those who don't use their self-restraint may be punished. But the District Attorney's Office truly doesn't believe in either a general system of punishment or one of imprisonment. I believe that in Philadelphia, for example, — despite some suggestions to the contrary — the vast majority of cases do not end up in prison. Twenty percent are going into pre-indictment probation and, if it works, this percentage will grow. But there are clearly other cases; there are cases of violence or recidivism where we must do something to break the pattern. Maybe we should have done something thirty years ago, but we now have people who, unfortunately, are not fit to be our neighbors, and I think we have to punish them and hope that that gets through to them.

MR. TAYLOR: I think that those same principles apply to many of the guards in both the county as well as the state systems.

How much investigation has the District Attorney's Office done on guard brutality?

MR. CRAWFORD: In fact, Mr. Taylor, we have spent substantially more time per case on the question of guard brutality — substantially more time, with much less success, because it is much more difficult to get people to talk straightforward. I expect this to be so because a lot of them don't trust us. They think we are going to go to the guard and say, "You know what that prisoner said about you?"

MR. TAYLOR: If you start the investigation, I'll get you witnesses.

MR. CRAWFORD: I'll see you after this program.

COMMENT: You had a lot of innocent people who were swallowed up in this Holmesburg riot. Those in the kitchen, or those who, by no choice, lived in the same area where the mess hall was located, weren't even involved. They received charges. Many innocent people, inmates who were waiting to be tried, were in the same area when the riot took place. You will find that there has been a large number of them who were also charged, were shipped to state prisons all over Pennsylvania, went to court, and were then tried and received time for charges prior to the riot. Some of them have been threatened and have been coerced to say that they have seen "such and such" a person do "such and such" a thing, and if they don't, then they may lose parole.

MR. CRAWFORD: Can you name me some names?

RESPONSE: If you want to start an investigation, I can bring you some names and some individuals.

MR. CRAWFORD: I personally put every charge on that riot and I will put them the other way too.

COMMENT: You have inmates that are being told that if they don't do "such and such" a thing, they will be denied parole. They are eligible for parole. They have been brought down from other state prisons to testify.

MR. CRAWFORD: I am prepared to listen to any names, to any inmate, and to investigate it. I have never heard this before.

QUESTION: If I give you names, can you protect the inmates from the guards?

MR. CRAWFORD: We have moved them repeatedly. I think that we have been able to provide protection in every case where we have been requested to do so. At least one man I know of is out because I felt there wasn't any safe place for him inside. We put together a three-judge panel and took him out of the prison. Yes, I'll provide protection.

COMMENT: Did you receive information on the inmate who had his skull fractured and limbs possibly broken by guards? You know the guards weren't prosecuted. As a matter of fact, one of the reverends was hit in the head.

QUESTION: I would like to address this to Mr. Brierley. The statement was made that judges are not penologists. With what frequency are the administrative people of the Pennsylvania prisons penologists?

MR. BRIERLEY: I certainly don't consider myself a penologist. I consider myself to be, in the main, a practical prison administrator. I believe the term penologist defies definition. A real penologist is the gentleman sitting right next to me. (Indicating Mr. Taylor.)

QUESTION: What I had in mind, is there any machinery within the prison itself so there can be a dialogue between the inmates and the people who are in direct contact with them — the guards and the "higher-ups" — or, is there only a monologue?

MR. BRIERLEY: We do have dialogue. I initiated a program while I was superintendent at the Eastern Correctional Institution involving the corrections officer with a professional in a co-therapy, co-counselling group. The method was staff development, with the expansion of the professional staff to include the corrections officer who received some basic training in counselling, and who then acted as a co-counsellor with his own groups.

QUESTION: I meant more along the lines of grievances that the inmates might have. Can they go directly to you?

MR. BRIERLEY: I would not hesitate to state that I stood in the deputy's office when I went to Pittsburgh two years and two months ago, and in the first two months I must have interviewed almost every resident of our institution. That was unheard of prior to my going there. Before my arrival, a warden would never sit with a resident and give him an opportunity to express grievances or whatever else was troubling him.

QUESTION: I would like to ask any of the panel members what sort of system they would propose to hear prisoner grievances. Mr. Rabinowitz has suggested one form. Mr. Crawford has suggested that such a due procedural matter might take too much time and wouldn't be appropriate. What is Mr. Brierley's position as to redress of prisoner grievances?

MR. BRIERLEY: Grievances, real or imagined, can be heard with the program that we have — again I direct my remarks to the Pittsburgh institution — where counsellors are living in the cell block with the residents. They have access to their counsellor and are able to relate to him any grievances they might have. The complaints are then considered before a staff — classification staff — comprised of both the treatment personnel and the corrections personnel. They are able to voice grievances and they are also able to direct a request to me personally for an interview.

MR. DOWD: As I suggested, this is not the end of the day. I would like to thank all of you for coming to the meeting. I especially thank the panel for sitting through a long afternoon with us.

## II. EVENING PANEL DISCUSSION

JUDGE SPAETH: I wish to begin this evening by making reference to an observation by Dean Paulsen at the opening of his remarks this afternoon. He said that although in listening to us there seemed to be a great deal of agreement, as you examine the different points of view, perhaps you find a great deal of disagreement too. The position that I advanced is one that finds little if any support in the cases as they now stand, and raises two very difficult issues. One of them was remarked upon by Dean Paulsen and it is the basic question of what it is in our society that the courts should undertake to accomplish. I think the Dean, and I am quite sure Mr. Crawford and Mr. Brierley, would incline to the view that prison reform must come principally from the executive and legislative branches. Because, for example, these branches have better fact collecting facilities and, perhaps, particularly because reform requires money and money must be raised by taxes and taxes must be imposed by those who represent the people. I don't deny that there is great force to that point, and if a court ventures into areas where it isn't well equipped, the result will be to bring its judgments into disrespect.

On the other hand, although I assent to those dangers and agree that the spectre of them has kept the courts out of prison reform in

the past, I nevertheless remain convinced that the courts must interpose much more vigorously now than they ever have in the past.

At this point I would differ with Mr. Rabinowitz who would base his assertion of prisoners' rights largely on an interpretation of the Constitution. He and I tend to come out the same way, but by different routes. I'm skeptical that the Constitution can be read as expansively as he reads it. I would have the courts interpose in prison administration not simply on the basis of a reading of the Constitution, but on the basis of defining what it is the prison must do if it is to be an effective agency. By agency I mean an agency of the courts. In short, I would confess to impatience. Unquestionably, the legislature should provide funds for prison reform and I hope that it will, but nobody has fewer votes than a prisoner. Unquestionably, the executive should provide leadership, but the executive is always leading in other areas and I think that the crisis in our prisons is a crisis in the entire system of law under which we claim to live.

The prisons have become ineffective, which is just another way of saying that the courts' judgments of sentences have become so ineffective that I fear the respect for legal process is gravely in danger. My basic point is that if a judge is to discharge his responsibility with what I regard as an appropriate sense of professional honor, as a matter of reality he has no choice but to enter into admittedly or concededly very difficult areas. He must say to the prison authorities, "This is what I expect the prisons to accomplish, and if it is not accomplished, I will entertain appropriate proceedings to enable me to direct that it be accomplished."

My last observation would also be by way of confession and avoidance because this view has not been taken by the courts; we have no precedents as to what appropriate procedures would be. I am worried, but not alarmed about that, because, in the field of administrative law generally, appropriate procedures have been worked out and I think they could be worked out here. The spectre of the courts meddling in prison administration won't materialize; most of the time the courts will defer to the expertise of the wardens. But the fact that the courts would, upon occasion, be willing to look where they have not looked before, would have a very beneficial effect.

MR. RABINOWITZ: I would like to add only two observations; maybe they are two aspects of the same observation. In the first place, my possible disagreement with Judge Spaeth exists only because I had not heard his paper before I came here. If I had, I would probably have been prepared to agree with it in its entirety because I must say that I thought it was a novel and very provocative

approach to the entire problem. If I had thought of it before, and if I thought I could get any other court to agree with me, I would have projected it long since. But since I hadn't thought of it before and I don't exactly know, as Judge Spaeth points out, just how to do this — although I hope we will be able to work out some way — I was tossed back on the other weapon in the arsenal which is that old Constitution of ours.

Second, I may have created the impression that I was putting exclusive reliance on the Constitution; I didn't mean to do that. All rights of human beings are not spelled out in the Constitution, but many of them are. It was my thesis that to start with a much more rigid application of the Constitution to prisoners would have a salutary effect. It would perhaps give the prisoner some feeling that he has rights and not merely the absence of rights; it would give the prisoner some feeling of dignity which is comparable to what other human beings have; and it would to some extent mitigate the terrible deterioration of the human being that goes on under normal circumstances. I cannot agree with Dean Paulsen that the enforcement of the Constitution is not the function of the courts. He will recognize that as a tendentious way of formulating the question.

DEAN PAULSEN: Not only that, but wrong.

MR. RABINOWITZ: I think that to the extent to which courts can be convinced that constitutional rights are being violated, it is their job to remedy it. Our Constitution, fortunately, is a document which is growing — at least in the hands of good judges — and developing in ideas which years ago were not accepted, but today are accepted as a matter of course. I would hope that this process be extended. To the extent to which approaches such as mine can extend it, I think that they ought to be made. I am not excluding the function of the executive and the legislature; moreover, I do not see any reason why we must adopt an exclusive approach. Just one other thing: the suggestion that all of this should be left to the legislature may get us somewhere in the long run, but as has been remarked by other people on other occasions, in the long run we'll all be dead.

MR. CRAWFORD: I would suppose the basic two thoughts that I would want to throw into the discussion have already been raised, at least in part. First, prison has to be viewed, as I see it, as a last resort. There have been a lot of suggestions in this discussion that prison turns people into brutes. My suggestion is that we should begin to realize that people who haven't been rather heavily brutalized

don't belong in prison at all. If you're talking about a multiple rapist, or a multiple robber, or a murderer, or a person who commits repeated assaults with intent to kill, my real fear is for fellow prisoners and not for this man's brutalization. As we try to prevent imprisoning the people who aren't going to pose vast problems on the prison systems, and who haven't posed vast problems in their own lives, then you're also going to be talking increasingly about difficulties in running the prison system and in making it a system which doesn't totally deprive the prisoner of his rights. He continues to have the basic constitutional rights. I think that is the spot where the great agreement lies — if there is one — on the whole panel. There is no question that the Bill of Rights type rights in the Constitution belong to anyone who is in the United States or under the United States Government unless there are reasons to take them away from him. That would be the first reason why I would think of prison as a last resort, but even for those who are placed in it as a last resort, rights must be preserved.

As my second point, I would like to put in another blow for the legislatures. I still believe that in a democracy it is the legislature that sets the law and not the courts. We have — perhaps as a result of the Warren Court facing our race problem that the legislatures were unwilling to face — come to believe that the courts are the real legislators and that the Congress and state legislatures follow along behind. The courts carry out or enforce legislation. The legislative mandate is also interpreted in many of the great decisions of the Warren Court. After all, they were not interpreting the Constitution, they were interpreting acts of Congress. Consider, for instance, the Selective Service Act; until a bad blow it suffered quite recently, its language was being used to set forth rights as great as any in the Constitution.

I really wonder about hundreds of judges with thousands of judgments of sentence, each believing that in his judgment of sentence he has created not merely a term of imprisonment and some conditions of imprisonment for the prisoner, but a control of the prison system. Each judge — and in Philadelphia County there are sixty or seventy judges at any given time engaged in sentencing people to prison — says "Now my judgment of sentence includes a prison system run in keeping with my view of justice." This must create an impossible chaos. The legislature has more members, but they have to vote on a single piece of legislation in the end, and the courts then can interpret it. I think the courts must enforce constitutional and legislative standards. However, the rights of prisoners come from the people

through the legislature and from the enforcement of the legislature's acts.

I think, perhaps, the civil rights area may be again a good analogy here. The great blows struck by the Warren Court, and particularly by the lower courts in the South during the fifty's, were consolidated and their realization is probably going to come not out of the court decision, but out of the great legislation that was inspired by a revitalization of belief in racial equality in a great many people in this country. The Court said that we mean it when we say we have equal protection of the laws; we mean there isn't going to be racial discrimination. Eventually, congressmen from some very unlikely spots, as a matter of conscience, had to vote for legislation that said the same thing. The legislation was, of course, more detailed and more far-reaching, and was subject to administration from the courts. It is probably a back-and-forth matter of one feeding the other. I would hate to think that it would merely be a matter of a right for the courts to create some sort of common law administered roughly from the top by the appellate courts, and subject to a great degree to the feelings of individual judges, some of whom may not be so restrained in their respect for the administrative process as is Judge Spaeth.

MR. BRIERLEY: I am in agreement with the members of our panel for the most part, but I present another side of this story. Charged with the responsibility of administering a state correctional institution, I am bound by policy promulgated by the Bureau of Corrections. I must enforce rules and regulations that I don't necessarily agree with. I will admit to you, drawing upon my 31 years of experience in two maximum security prisons — Old Eastern State for 29 years and The Western Penitentiary for the past two years and two months — that prisons are failures. We have accomplished nothing except house a person for a certain number of years. Men who leave prison and never commit another crime do so *despite* the program that we offer them. It may be for a number of reasons. Possibly, they hated the prison system to such a degree that they have never committed another crime.

By the same token, we have within our prison population a number of men who have been so completely institutionalized that they fear leaving prison. This is home. I am merely voicing what was told to me by prisoners who live in prison. There are traumatic experiences undergone by some of these men who leave prison. Living within their own peer group they are really "big fish in a little pond," but faced with the responsibilities of society and the lack of regimentation afforded them within the prison system, they become "little



fish in a big pond" and are unable to cope with the problems presented by society. This is a commentary on our prison system.

What I feel we need so desperately — and of course this is an old cry that perhaps many of you have heard time and again — is sufficient funds to implement programs. Take that monolithic monstrosity of "Old Eastern Penn" which received its first prisoner back in October of 1829, or the monstrosity out there in Pittsburgh. Can you picture two cell blocks five stories high, one housing 600 residents and another housing 540 in cells that are literally cages? How can one possibly become "rehabilitated" in such a setting, regardless of the programs which we have initiated? A prisoner is out of his cell for but brief periods of time, taking part in "programs," and returning to his cage. I feel very strongly that we need a vehicle similar to the one that has been responsible for the tremendous advancements in mental health. Some of you in my age group will perhaps remember the motion picture "Snake Pit," concerning horrible conditions that existed in our mental institutions. The public was aroused. This, I believe, was responsible for legislation and for appropriations that went into mental health. We in correctional institutions are in need of a vehicle of this type. I would love to see the day, and I hope that I do live to see it, when institutions as we have today become razed to the ground, completely demolished. Let us build humane, treatment-oriented facilities to cope with the problems of today. We are trying to institute programs geared and projected for the year 2000 in a physical plant of the last century. We have no room — there is no room to expand; no room to build.

We are faced with a very serious problem, wherein the employees of our institutions are underpaid, and thus, we can only attract that type of employee which we pay for. A number of people employed in our institutions are unable to undergo these periods of transition. I have undergone a number of them, and now we are faced with another. Mr. Sielaff is responsible for initiating a new program, a new thinking, a new philosophy. The personnel in the institution, especially the corrections officers, are unable to cope with these very broad and needed changes. The program also affects some of the professional treatment people. This resulted in a confrontation. Last Wednesday, I agreed to meet with about 125 of our corrections officers. They were very concerned and lashed out against the administration and the new philosophies of prison keeping. I listened to, and took part in, the confrontation until early Thursday morning. Nothing was really accomplished, except they had an opportunity to ventilate some common grievances.

We are desperately in need of change in a number of areas if we are to have true "prison reform." We cannot reform, we cannot rehabilitate, we cannot reintegrate into society a group of men who must live for years in a cage. I hope that I can live to see the day when we will make some progress. For too long, much too long, all of the changes that have been promulgated have always remained in the talking stage, and we have never gotten into the doing stage.

It was very gratifying on Wednesday to have been made aware of a very drastic change that is coming about: one which is out of the planning stage and into the implementation stage. We hope that by next year, or at least within two years, at least half of our state prison population of approximately 6,000 men — and my personal feelings are that only about one to two percent of these men must remain behind bars — will be living in the community. Speaking in terms of community-based facilities, we do have what have been referred to as pre-release centers and work-release programs. The effectiveness of this manner of dealing with the offender has not yet been proved. We don't know what the result of this new trend is or will be, but now we define a community-based facility as a room in a motel, a room at the YMCA, or even the resident's own home. *This is now.* Let's hope and pray to God that this proves successful.

MR. TAYLOR: It is very interesting here that we have a Warden who openly confesses that prisoners don't enjoy constitutional rights, while a District Attorney is saying they do. I think this demonstrates quite clearly that the District Attorney's Office has no real appreciation for what it does to the many people for whom it demands long prison sentences. However, rather than go back through all that again, I suppose I should take this opportunity to point out some of the things I feel could be done right away toward implementing certain constitutional rights for incarcerated persons. First of all, prison disciplinary hearings are very high-handed, biased affairs, with not even an inkling of due process present. It is prison staff which writes one up (accuses one of rule infraction); it is prison staff which presides at so-called hearings; it is prison staff which determines guilt and the severity of punishment. Prisoners are not allowed to face their accusers, or question witnesses against them. Nor are prisoners allowed to be represented by counsel, or to have at their sides some impartial person to protect their interests. By the very nature of the prison environment, no one is ever found not guilty of the charge of which they are accused. In many cases, even where proof of innocence is very clear, the prisoner is simply stripped of privileges (movies, church, school, recreation, etc.), as opposed to

the harsher punishment of solitary confinement (the "hole"). The point, in short, is that once one is accused by a guard or prison worker of breaking a rule, he is bound to receive at least some form of punishment. So, in fairness to everyone concerned, and with a minimum of problems, prison disciplinary hearings should be conducted by impartial, unbiased parties, with opportunity for representation afforded to prisoners accused of prison rules infractions.

Equally important and directly related to the disciplinary hearing issue, is the fact that prisoners are not allowed representation at Parole Board hearings which determine the prisoners' eligibility for parole release — a critical stage of the proceedings, indeed. The Parole Board's determination is based in large measure upon the prisoners' prison record. Therefore, I think it is very clear how important it is for prisoners to be allowed to exercise the right to counsel at both these critical stages of state proceedings against them. The prisoners are accused, tried, and punished by prison officials without benefit of counsel. This record is then utilized by Parole Board authorities to deny parole in many, many cases. I cannot personally imagine a more blatantly unfair situation. Thus, prisoners should be represented by counsel at Parole Board eligibility hearings, with a right to appeal from adverse decisions.

The obvious hypocrisy that presently permeates the penal complex in this state, as well as the entire country, will continue to dominate until such time as adequate facilities are made available to persons convicted of crime to up-grade their skills and thus create alternatives to the life-styles which assisted them in becoming law breakers in the first place. At the present time in Pennsylvania prisons, no meaningful program exists on a large enough scale to accommodate the vast amount of prisoners passing through the prison gates. Educational and vocational training *must* be made available. Rehabilitation *must* become a *right*. Otherwise, these institutions *must not* continue to be euphemistically called "correctional," and should, in fact, be recognized as the hopeless dens of retribution that they are.

DEAN PAULSEN: I am going to insist that the question in part be what are the constitutional rights of persons in prison. It seems to me that the most recent one that we have experienced is the *Sostre*<sup>2</sup> case in which Mr. Rabinowitz has been very interested. A prisoner was put in solitary confinement for a year for what the lower courts regarded as his discretion and adherence to certain political views, and the expression of them not so much in public, but just expressing them to the warden and threatening the warden with legal

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2. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

action. The court did not do in that case what many courts have done in the past, and that is to say that, "This is none of our concern, we remit all these questions of matters of discretion to those who run the institutions." The court did, as I read the opinion, go forth and ask the question: "What does the Constitution require?"

I think that it is unlikely to be the case that the Constitution will require that the same rights be extended to prisoners as they are extended to the population generally. And I think that so far as we have court intervention on the constitutional basis, there will be an articulation of rights that prisoners have in common with the general population, and some which they do not have. For example, it would surprise me if free speech and assembly are recognized in a prison community the same way they are recognized in the general population, with the right to call mass meetings, the right to say what you please, the right to advocate open reviews. It would surprise me if the courts would extend the same freedoms in the same way for a unique population brought together because of conditions of crime. It would surprise me further that the full recognition of freedom from unreasonable searches and seizures will be recognized in the prison population to the same extent as in the general population. Indeed, I suppose that the most precious of human rights — the ability to move about — is by definition denied those who are in prison.

Clearly, no person could come and lock anyone up without some kind of judicial procedure and still act constitutionally even if that person were a public official. Yet, that is the very basis of the prison system. Some rights, of course, are recognized. The *Sostre*<sup>3</sup> case does say that important decisions that take away some precious rights from prisoners — such as the right to be in the same general population as the rest of the prison as opposed to solitary confinement — can be made only with some kind of recognizable reason, and after some kind of inquiry on the part of the prison officers in a way that would permit some participation on the part of the prisoner himself. Certainly, there would be limits to the treatment of a person in prison. The imposition of harsh physical punishment would undoubtedly run foul of the constitutional provision against cruel and unusual punishment.

The question is not whether courts will interfere if constitutional rights are violated. I would put the question as being what are the reasonable constitutional rights for prisoners given the tension between those rights which are in the first eight amendments, and the serious necessity of maintaining some level of order and discipline inside the prison population.

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3. *Id.*

The second point I wish to make is a response to Judge Spaeth. He would have courts interfere with certain aspects of prison administration on a non-constitutional basis, if I read him correctly, on the grounds that a sentencing judge has a responsibility to see to it that the sentence which he imposes accomplishes some rehabilitative purposes, at least so long as the penal system does seek to achieve that particular end. I am not sure you would always want to do that. Suppose, for example, that the prison administrators in the Eastern State Penitentiary decide that one of the great problems of the prison life is its homosexual activity. They decide not only to have a system of conjugal visitations, but they aren't particularly worried whether the prisoner is actually married to the lady who comes in. They decide that perhaps girl friends, and maybe others, might make visitations to lower the level of sexual explosion in the prison. I would think that the prison administrators, if they get public support and could do it without shocking the legislature out of their shoes, ought to be permitted to do that as opposed to some Judge saying that: "Well, I sent this fellow up there for rehabilitation, not for fun and games; I don't think that the men I send up there should have ladies visiting them every Saturday night."

We learned this afternoon that it may be possible on the 15th of March for prisoners to buy from their own funds radios and maybe the possibility in the future of television sets.

MR. BRIERLEY: No, also television sets.

DEAN PAULSEN: Well, it is a positive judge that says, "I don't think the people I sent up there ought to have those frills because not everybody can buy them; they are only for people who can afford them. There are a good many poor people who cannot afford them, and that will be bad for rehabilitation, that will create tension inside the prison, and so I hereby order the correctional system not to do that." The trouble with the judges is that they are wonderful as long as they are on your side, but there have been long periods in this country's history when they haven't been on your side. We tend to forget about that. We've had a long honeymoon with the judges in the area of race relations, one man-one vote outcomes, and a series of interferences with the political process. This is where the judges have called our attention dramatically to lapses between our prescribed announced ideals and our practices. All you need to have is a couple of extra judges on a panel and you get different results which you may not like so well.

There is a wonderful phrase which was in a tax case, and hence interesting, where a judge was asked to disregard a 5 to 4 decision of the Supreme Court of the United States, and there was some reason to believe that he should. There were new judges on the bench, and it looked as if the precedent was no longer going to be followed when the Supreme Court got the question. However, the intermediate appellate court got the question, and instead of anticipating what most people thought the result would be in the Supreme Court, this judge wrote that, "It is not meant for a lower court to disregard the precedent of the Supreme Court of the United States. We must await the judicial miracle of the loaves and the fishes, four becoming five." The trouble is that four do become five, and it is regarded as an unpopular point. One must remember that judges are the most insulated from political pressure in society; they have life tenure, they are generally not elected, and they sometimes can become out of tune with the people. If you place the power in the judiciary, it seems to me that you just can't say, "Well, the judges have the power as long as it's going well for me, but they don't have the power to interfere with corrections when it goes against what I think is good." That basically is the trouble I have with Judge Spaeth's stand. I am unfamiliar with the power of the courts in Pennsylvania, but I do believe it to be true that in most places there isn't a colorable argument for the point that the judges have any power over prisoner's once they have been sentenced. Surely, in the area that I am more familiar with — the juvenile area — it is very common to say once a judge has packed somebody off into the correction authority, he is through with what happens. Further, one of the points that Judge Spaeth made was to call attention to a recent Pennsylvania Supreme Court opinion which apparently mandated the expenditure of public money in considerable sums to carry out the correctional program in connection with probation.<sup>4</sup> Well, if one goes that route, and if the judges can really mandate expenditures, it could go into many different areas such as mental hospitals, or the rights of children to have schools. Surely, the fertile minds of lawyers could construct lawsuits on that basis. He would really have to have an edge on the court system which we might call the budget committee. The budget presentations would be made to the judges. It's just not going to happen.

MR. TAYLOR: I would like to direct my first question to the Judge. The Judge's feeling seems to be that in order to bring about prison reform, there has to be something done by the legislature. The general feeling up to this point at least, is that the legislature

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4. *Commonwealth ex rel. Carrol v. Tate*, \_\_\_ Pa. \_\_\_, 274 A.2d 193 (1971).

has failed to do this. If the Judge can't do this alone, and he knows that the prison system is failing, then why does he continue to sentence people to prison?

JUDGE SPAETH: No, I didn't make myself clear. I don't think that the prisons can *only* be reformed by the legislature; I think that has been the view in the past, the view that I would like to see changed. I would agree with much of what Dean Paulsen has said, but I think partly it is sort of a "slippery slope" argument. Just because you are one step down the slope doesn't mean you have to slip all the way to the bottom — he had me tumble over in a heap at the bottom.

DEAN PAULSEN: You did do it. You did indicate that this interference would be sporadic in character.

JUDGE SPAETH: I really think that you will find you need not fear judges who have been so timid in the past as to decline to intervene at all. All that has to happen is for a warden to say, "Boo! I'm an expert," and the judge says, "Oh, my dear man, so you are. We won't look at this situation." I don't quite see judges becoming the tigers of interference that the Dean fears. There would still be a great deal of deference, I think, to prison administrators. I would feel more comforted if some prison administrators somewhere had tried to do something that aroused the public. I don't blame them for not doing it. They are in a very vulnerable position. I think that is where the particular contribution of the courts can be made. The fact of the matter is that quite a few times the legislature won't do something because they are afraid they won't get elected. The executive won't do something because they are afraid they will get clobbered by the legislature, and so they let the courts do it. It's a pity if the courts don't do it. It may be a very painful thing, but to some extent the function of a judge is to be a lightning rod — it is not very nice to be a lightning rod, but once in a while I think that's what he has to do. I think that's why we have this extraordinarily interesting phenomenon in American history where some of the most democratic reforms have been initiated by the least democratic branch.

MR. BRIERLEY: I might add we do have some prison administrators who are attempting to arouse the public.

JUDGE SPAETH: And I would like to encourage them. I think that, given a boost by the courts, there are prison administrators all over the country who, given some encouragement and given some support, would respond in a way that would astonish the public.

Too many people expect the prison administrator to be a prison keeper — that's the old fashioned word. Certainly, as you heard this evening, no man of professional pride such as Joe Brierley thinks of himself merely as a keeper. However, the public does think of prison superintendents as keepers. I think that a very fruitful relationship could develop between the courts and the prison, and that this in turn would encourage the legislature to expend some money and try new ideas. No doubt you would get some judge being meddlesome, but judges are always meddlesome; that's what they're there for.

MR. BRIERLEY: I haven't received a call in the past two days from Pittsburgh, and I am very confident at this time, although I fear that by the time I return, I may be censored. Although it is comparatively new, two weeks ago, after some planning, some residents of our institution regardless of sentence, but all involved in the same particular problem of drug addiction, were permitted to wear civilian clothes and appear at six of our schools in the Pittsburgh area. They left the prison without any uniformed guard, accompanied only by their counsellors. This is a completely new departure. I hope that by the time I return. . . .

MR. TAYLOR: They won't come back.

MR. BRIERLEY: . . . but we are trying, and I will continue to try as long as I remain in the position that I occupy.

QUESTION: I should like to ask Mr. Brierley a question, but first let me make sure I have what you said straight. Did you say that you are in a position such that you have to enforce rules and regulations which you might not agree with?

MR. BRIERLEY: Yes.

QUESTION: Could you give us an example of such a rule or regulation; could you tell us in what form such rules and regulations are, and how the legal profession might get answers to them, if there are such rules?

MR. BRIERLEY: No, you are placing me in a very embarrassing situation, and I will not answer your question. One thing that I have learned in my years in this business is to be loyal to your boss, so I must decline answering your question.

QUESTION: Well, if you can't tell us what rules you disagree with, could you describe in what form these rules are?



MR. BRIERLEY: Yes, policy in the past. From the year 1953, when the Bureau of Corrections was formed, policy affecting all the state institutions was a result of the meetings of wardens or superintendents of the various institutions meeting with the Commissioner and the Deputy Commissioner of Corrections, and also advised by a Deputy Attorney General assigned to the Bureau of Corrections. There were times when it was a most democratic-type of meeting where you had an opportunity to voice needs in specific areas and the Commissioner of Corrections then, by counting those at the table, stated, without any fear of contradiction, that this is the way it will be. It was a very undemocratic process — no one could vote, but this has changed. Thank God that we now have Mr. Sielaff as our Commissioner of Corrections. I am very gratified that on the eve of my career we were able to put into practice many of the functions for the good of all our residents that have been so necessary. Now the workers in the field of corrections must undergo a period of training and education which gives them an understanding and a feeling that is completely radical to their previous way of thinking. We used to think in terms of men as corrections officers who will spend, say, twenty years in our state institutions trained in one area alone — tight security and custody. When we opened the institution to bring in the community, to make use of community resources, we met with what I would rather call passive, but certainly very disruptive, resistance on their part.

QUESTION: When a new prison official, a guard just starting out at \$6500 a year, comes into the system, what training is he given, in terms of dealing with the prisoners? If he is given none or very little, are there any programs in the works now to train these people?

MR. BRIERLEY: Yes, Commissioner Sielaff, is building a training system at the Bureau which will be referred to as the Academy for Corrections Officers. He has been able to recruit, from out of state, some top training people, and will initiate a training program. When I first arrived at Pittsburgh, I myself conducted a ten week in-service training program. I spent two nights a week in the institution, conducted the program and then initiated the position of a training officer charged with the responsibility of conducting a continuing in-service training program. Our attempt was to open lines of communication between the Bureau, the administration and the residents. It has had its effect, but the effects aren't readily visible at this time, because of,

as I stated, the very recent confrontation of last Wednesday evening. Nevertheless, we are initiating good training techniques.

QUESTION: With the so-called failure of the prison system, I was wondering what thoughts or criteria Judge Spaeth would use in imposing a sentence on an individual, keeping in mind, perhaps, that the length of the sentence may hurt the person rather than help. Now, also along this line of reasoning, what did you have in mind in relation to getting reports back on how an individual is progressing in the prison set-up?

JUDGE SPAETH: On your first question, I think I have followed in my own sentencing practices what Mr. Crawford mentioned, and that is that imprisonment is the last resort. I think it is helpful to talk in terms of presumptions. There is a presumption in favor of probation. Most criminal defendants are either not sentenced or are sentenced to short periods. So far as I am concerned, and as far as many judges are concerned, the fact remains that you do see a certain number of persons who are, and have demonstrated that they are, dangerous, and you simply cannot put them from the courtroom out onto the street because they will hurt somebody. A judge has a double responsibility; he must try to be fair to the defendant, but he must also recognize that he owes a responsibility to the community in which he sits.

That brings me to your second question which is, as I understand it, what kind of supervisory reports the courts would expect. I am not sure that the report should go to the court initially. I would be inclined to think that it should not, because I am sensitive to the Dean's point that the intervention of the courts into prison administration should be restrained. I do think that reports should be more frequent, and more detailed than we have now. I would look to see this reform being accomplished chiefly within the parole system. At present in Pennsylvania, and I think in the United States generally, when a prisoner becomes eligible for parole he receives some sort of interview and then a notice whether the parole application is granted. It is essentially an unintelligible rule. He doesn't understand it; he doesn't really have much of an opportunity to present his case. Sometime ago Justice Frankfurter remarked that the development of liberty has been largely the development of the law of procedure. I think that is true, would be true, could be true of the law of prison administration just as much as it has been in the law generally. I think if we develop articulated procedures whereby a prisoner knows where he stands and why he stands there, and has

an organized method of presenting his point, the pressures of articulation will result in a rationalization of the procedures, and I expect from that, the judicial review would become intelligible.

MR. CRAWFORD: I wonder if everybody is aware that more than half of the people in the prison system haven't been sentenced there. I think that we have missed a point which probably should have come out a long while back, a point which those in my office are very concerned about as I am sure that many of you are — the bail system and the existence of the use of pre-trial detention as a means to keep most of the people in prison. The people who are in on pre-trial detention have invariably not been as well classified as the sentenced prisoner. They are in an institution which is normally in a physically inferior condition to the institutions of sentenced prisoners. They have no programs compared to those available, even those meager programs available, to sentenced prisoners. The excuse is, I suppose, that (a) they are there for a short time, and (b) you can't force a man who hasn't been sentenced to participate in a program. The result is that most of the troubles — and certainly the entire brutality, for instance, that drew me into the riot at Holmesburg — are among unsentenced prisoners. You wouldn't have had at Holmesburg twenty-nine murderers on sentence. You did have in that mess hall — may I give him his presumption of innocence, although most of them have lost it since the time of the riot — twenty-nine accused murderers, innumerable accused robbers, accused rapists, all mixed in with those accused of the mildest of crimes, unclassified and unsupervised. By the time Judge Spaeth gets a chance to pronounce sentence and to start to supervise these people, many of them have finished serving their sentence, and many more of them are never going to go to places where they will be pretty well supervised. I think we've probably avoided the real snake pit of the system, by not talking of detention centers.

MR. TAYLOR: Can a district attorney recommend bail within a man's means so that he wouldn't be confined before his case?

MR. CRAWFORD: We handle, with the help of Villanova law students, about seventy-five people a week where, if we need to, we put him out with no bail at all.

MR. TAYLOR: But not at the time of the riot.

MR. CRAWFORD: We were doing it before that time. With the Villanova students, we upped the number.

MR. TAYLOR: You classified them in preventive detention?

MR. CRAWFORD: No, I don't think we've ever classified as preventive detention. We've let people out where we thought there was a decent prognosis on it. We are still not prepared to take the chance. Maybe a court will make us, but we aren't prepared to take the chance that everybody gets out until. . . .

MR. TAYLOR: No, I don't mean let people out, I mean recommend bail be set within a man's means.

MR. CRAWFORD: Well, you mean one or the other. If you say always what he can make, then you're letting everybody out.

MR. TAYLOR: Yes, but that's what the law says, that you should set bail within a man's means.

MR. CRAWFORD: If you find where it says that in the Constitution, bring it to me. It says reasonable bail. I think that for a person who has committed repeated rapes, reasonable bail is not fifty cents if fifty cents is what he has.

MR. TAYLOR: Yes, but then the bail would be within his means.

MR. CRAWFORD: I disagree with you, and we can fight that one out later. I think many ought to get out that way.

MR. RABINOWITZ: In connection with this matter of pre-trial detention, I would just like to point out what we may expect from the tender mercies of the legislature. So far as I can make out, the tendency of at least the Congress of the United States, and perhaps many state legislatures, is to move in exactly the opposite direction, to adopt rules as have been adopted in the District of Columbia which permit preventive detention which make less likely the release of people on bail and which increase the pretrial population of prisoners. Now, I think that all of these things are unconstitutional. I think that someday — maybe ten years from now — the Supreme Court will get around to say it. I hope. I think that's a pretty good indication of the kind of assistance we can look to if we are going to rely exclusively on our legislatures for help.

QUESTION: My question will bring us back to the Dean's very relevant inquiry about the definition of whether or not there are constitutional rights of prisoners. For example, if everyone is entitled to a radio and a television in his cell, what are the other prisoners' rights with respect to the use of these things? Finally, does the

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prisoner have the right not to be rehabilitated? That word seemed to be threaded through the conversation this afternoon. I am curious about the latter question. Does he have that right?

MR. RABINOWITZ: Isn't it kind of academic? Everyone here realizes that whether he has the right or not he's not going to get rehabilitated in prison. It's a rather academic problem as to whether he has the right to refuse it. Nobody is offering it to him.

MR. CRAWFORD: He may refuse group therapy, and I suspect Warden Brierley may know some people who have refused that. I think Mr. Sostre refused group counselling or therapy, that's one of the reasons he spent as much time in solitary as he did.

MR. RABINOWITZ: The group therapy and counselling that Sostre was offered had no relationship to rehabilitation; absolutely none.

QUESTION: To Mr. Crawford: In light of what happened last summer at Holmesburg which you just described, and the subsequent judicial inquiries which went on, would you still feel that the judiciary ought not to play a role in prison reform?

MR. CRAWFORD: First, as counsel in that, and with one of the judges here, and with the matter pending before the Supreme Court of Pennsylvania, I have a good excuse not to talk about that specific case. I think I made clear my view on how far the court should interfere and under what standards. I think they should interfere to enforce standards set by the people in the Constitution, set by the people acting through the legislature. I don't think they should be setting up an additional set of standards on their own. I think a lot of other people ought to be doing a lot of humane things. But the court has only the right to enforce the law. Many of the rest of us may have the right to change the law, but I don't think the court has this right, generally.

QUESTION: But aren't there basic human rights?

MR. CRAWFORD: Beyond those set up in the Constitution?

QUESTION: Yes, you read the descriptions in Holmesburg. Surely you cannot expect a court to remain silent in the face of uncontested admissions of such conditions. Your office did not offer evidence that there were mattresses or proper food and proper medical care and so forth. Isn't it pretty absurd to say that the court should

not interfere when there is in fact no other social control agency that will step in?

MR. CRAWFORD: I assume that the eighth amendment is the standard that will be the most natural reference here. There may well be standards that can be enforced. Again, we are back to litigation. There are reasons why we didn't offer evidence. There are reasons why I think that the court acted improperly. Generally, of course, the court can enforce the eighth amendment; the court can enforce the first amendment; it can enforce the fourth and fifth amendments. In *Terry v. Ohio*,<sup>5</sup> it was held that search and seizure law even applies in prison. You may do what is reasonable in a prison. I think what is reasonable in a prison is a heck of a lot more than what is reasonable in my home, but I think the Constitution applies there. Mr. Taylor says Mr. Brierley and I argue that it may not be being applied there. I think it does apply there. I think the court should enforce it there. I have no problems with that. I suppose my problem at this point is with judicial law-making.

QUESTION: I would like to ask your comments on the responsibilities of a district attorney to the state correctional institutions within his county.

MR. CRAWFORD: Obviously, we enforce the penal laws there as elsewhere. For instance, when there were riots in Eastern State when it was in Philadelphia or where there were prison breaches, we enforced those laws. The administrative responsibility is clearly that of the attorney general in a state institution. Just as where a chief law enforcement officer in a county can turn to the county institution, the general administrative authority should come, I think, entirely through the attorney general. The fact of the matter is that after we finish cutting all these careful lines that we draw here, we then sit down and try to use our common sense together. As, for instance, in the question of transferring Eastern State to the city for us, that old building was to come under a lease and the decision as to what to do — and the eventual veto of the decision to turn it over to the city for a dollar — came after consultation among the District Attorney of Philadelphia, the Attorney General, the Governor, I assume the district attorneys of other counties who may have had some information, and some people in the city administration. The veto eventually was the Governor's; that was his responsibility. I think we've got very limited responsibility, but I think we have to use our common sense. What we know about our prisoners in an

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5. 392 U.S. 1 (1968).

institution in our jurisdiction or out of it, ought to be transmitted to people who do have responsibility and that's the Attorney General, the state Bureau of Correction.

DEAN PAULSEN: I have found this, if I can get on the couch for a minute, a very heavy day. I have never participated for so many hours with so little humor. . . .

MR. CRAWFORD: It's not a funny subject.

DEAN PAULSEN: . . . because the subject isn't funny. I'm serious. It is so dreadful, you can't really laugh about it in any of its aspects. I think it has been a kind of gloomy, heavy day spiritually. I think I'm not the only one on this panel that feels that. The audience I think, those of you who have been with us all day, certainly have that sense. I would hate to have us quit tonight by feeling that there was only a hassle as to what the courts should do, what the Constitution can do about these problems, and that one position or another was unrealistic.

I think that the prisons fundamentally are going to be made better when we make ourselves and our brothers and sisters in the general community better. These prisons aren't going to be any better as long as a great many of us — not just administrators and establishment people but the ordinary man in the street — feel that somebody who has committed a serious crime is to be considered literally an outlaw and to be treated as a thing and an object. I think to reform prisons in the long run, we are going to have to make ourselves more sensitive to the claims of our brothers and sisters in this world. It's a long hard road, and that is, I am sure, an occasion for impatience particularly among the young in our audience.

It may be that pushing the voting age down to eighteen will make the legislatures places of quickened conscience when conscientious and conscience-stricken people do something about the prison system. Now you know that there is an enormous push today to see the whole problem of crime and delinquency in larger terms than simply to get the offender and try to correct him and thereby reduce the level of crime. Surely the President's Crime Commission report cries out that the way you are really going to attack the system is to bring more justice into it, justice reflecting new attitudes on race, on poverty, on housing, on education — the whole thing.

I hope none of you missed the enormously significant story that one of the oldest and influential of the New York voluntary agencies has shifted emphasis. A community service society which for years has been working with families trying to correct individuals and

adjust them in their setting has finally announced that to some extent they are going to change gears and use their not inconsiderable influence and resources toward making an impact on society. I do not wish to be understood as being opposed to judicial intervention where there is capricious and vestial conduct on the part of prison officials, where there is in fact cruel and unusual punishment of a very shocking sort. In that relation we might, indeed, expand the list of constitutional rights to prisoners. I'm not opposed to that at all; I am firmly of the belief that the reality of judicial intervention will be minimal. We ought not put our money on it, we ought not put our energy into it; we ought to put our energy into changing ourselves and our society and our legislative and executive institutions.